

No. 83-284

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN C. MOON and ZION  
INDUSTRIAL CORPORATION,

Petitioner,

vs.

HYOSUNG AMERICA, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

OPPOSITION TO MOTION FOR DAMAGES  
PURSUANT TO SUPREME COURT RULE 49.2

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Petitioners oppose respondent's motion for an award of damages pursuant to Supreme Court Rule 49.2.

Petitioners seek certiorari to review the judgment of the Ninth Circuit Court Of Appeals dismissing petitioners' appeal from the judgment of the District Court For The Central District Of California. The Order dismissing the appeal from the underlying judgment is a final judgment disposing of the case on the merits. Jung v. K. & D. Mining Co. (1958) 365 U.S. 333, 78 S.Ct. 764, 2 L.Ed.2d 806; Catlin v. United States (1945) 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911; Rosenberg Bros. & Co., Inc. v. Curtis Brown Co. (1923) 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372.

The proceedings in the Ninth Circuit are limited to an appeal from the denial of petitioners' motion to vacate the judgment pursuant to Federal Rules Of Civil Procedure, Rule 60(b).

The pendency of the appeal from the Rule 60(b) motion does not affect the finality of the order dismissing the appeal from the underlying judgment. Federal Rules of Civil Procedure, Rule 60(b); Browder v. Director, Illinois Dept. of Corrections (1978) 434 U.S. 257, 98 S.Ct. 566, 54 L.Ed.2d 521.

A petition for Writ of Certiorari is the appropriate procedure to seek review of the appellate court's order dismissing petitioners' appeal from the underlying judgment. Humphrey v. Cady (1972) 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394; Carafas v. LaVallee (1968) 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554; Thompson v. Immigration and Naturalization Service (1964) 375 U.S. 385, 84 S.Ct. 397, 11 L.Ed.2d 404; United States v. F. & M. Shaefer Brewing Co. (1958) 356 U.S. 227, 78 S.Ct. 674, 2 L.Ed. 2d 721.

Petitioners seek certiorari to review a final judgment on the merits rendered by the Ninth Circuit Court Of Appeals. Petitioners have employed the appropriate procedure to obtain review of this judgment. Petitioners have not, and need not, invoke Supreme Court Rule 18 in this case.

An award of damages under Supreme Court Rule 49.2 is appropriate only where a petition for a Writ of Certiorari has been filed, and where there appears to be no ground for granting such a writ. Supreme Court Rules, Rule 49.2. There must be a clear showing of bad faith on the part of the petitioner. Illinois Brick Co. v. Illinois (1976) 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed. 2d 707, rehearing denied 323 U.S. 881, 98 S.Ct. 243, 54 L.Ed.2d 164; Fluro Electric Co. v. Branford Associates (2d Cir. 1973) 489 F.2d 320; West Virginia v. Chas. Pfizer & Co. (2d Cir. 1971) 440 F.2d 1079, certiorari denied 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115. An appeal presenting a unique problem is not frivolous so as to justify the assessment of damages against an appellant for prosecuting it. Jaeger v. Canadian Bank of Commerce (9th Cir. 1964) 327 F.2d 743. Damages will not be assessed if the appellant properly and vigorously urged his position. National Acceptance Co.

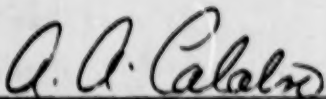
v. Frigidmeats, Inc. (7th Cir. 1980) 627 F.2d 764; NLRB v. Lucy Ellen Candy Div. of F. & F. Laboratories, Inc. (7th Cir. 1975) 517 F.2d 551.

Petitioners have invoked the jurisdiction of this court properly and in good faith. The petition involves important questions concerning the proper application of the federal rules of civil and appellate procedure. Accordingly, an award of damages pursuant to Supreme Court Rule 49.2 is not appropriate in this case.

Dated: October 5, 1983

Respectfully submitted,

CALABRO, CALABRO, CALABRO

By   
ALFRED A. CALABRO

Attorneys for Petitioners



CERTIFICATE OF SERVICE

I, Alfred A. Calabro, a Member of the Bar of this Court, hereby certify that on October 5, 1983, I served the foregoing Opposition to Motion for Damages Pursuant to Supreme Court Rule 49.2 on Respondent Hyosung America, Inc., in this action in compliance with Supreme Court Rule 28.3 by causing a true copy thereof, enclosed in a sealed envelope with first-class postage prepaid, to be deposited in the United States mail at 313 East Broadway, Glendale, California, addressed to counsel of record for Respondent as follows:

Y. PETER KIM  
TUTTLE & TAYLOR INCORPORATED  
Attorneys at Law  
60 South Grand Avenue  
Los Angeles, California 90017

I declare under penalty of perjury that the foregoing is true and correct.

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ALFRED A. CALABRO